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No. 82-848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SERVICE MERCHANDISE COMPANY, INC.,
Petitioner,

v.

AMANA REFRIGERATION, INC. and DAVIS-WATKINS COMPANY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

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On November 19, 1982, Service Merchandise Company, Inc. ("SMC") filed its certiorari petition in case No. 82-848. That petition is presently pending before the Court. On March 20, 1984, this Court decided *Monsanto Co.* v. *Spray-Rite Service Corp.*[1] The Court's decision in the *Monsanto* case strengthens and supports further the grounds on which we relied in the SMC petition. We therefore file this Second Supplemental Brief under Rule 22.6 of the Rules of this Court to call attention to the

[1] On December 29, 1982, we filed SMC's Supplemental Brief calling the Court's attention to the certiorari petition filed by Monsanto, the subsequent granting of which resulted in the Court's March 20 decision.

relationship between the *SMC* case and the *Monsanto* case and to suggest that the *Monsanto* decision requires the grant of certiorari in the *SMC* case.

ARGUMENT

A. The Relationship Between The Cases

SMC is engaged in the showroom, catalog and mail order business selling name-brand products of national manufacturers such as Amana Refrigeration, Inc. ("Amana") from its 110 showrooms located in 25 states. Petition at 2. After Amana received numerous complaints from its authorized distributors and dealers about SMC's low prices, SMC's business of selling Amana microwave ovens was destroyed pursuant to an agreement and concert of action among Amana and its distributors and dealers to fix the wholesale and retail prices of the ovens and to boycott and refuse to sell such ovens to SMC. *Id.* at 2-3. Like respondent Spray-Rite, SMC sued Amana alleging that such conduct constituted per se violations of Section 1 of the Sherman Act. *Id.*

The district court granted summary judgment dismissing SMC's per se claims and the Court of Appeals for the Sixth Circuit affirmed. The basis for both the dismissal and affirmance was that there was "insufficient evidence that a conspiracy or concerted action existed." *Id.* at 3-4. In the view of the courts below, the Amana activities which brought about the cutoff of SMC's supplies were only unilateral. *Id.*

In the *Monsanto* case, Spray-Rite's distributorship was terminated following complaints about its low prices. Spray-Rite then filed its complaint alleging the same per se price fixing and boycott violations as did SMC. Like Amana, Monsanto contended that its termination of Spray-Rite was unilateral. However, unlike the *SMC*

case, the district court submitted the case to the jury and the court of appeals affirmed the resulting jury verdicts of price fixing and boycott. Slip Opinion at 1-3, 10.[2] The evidence of concerted action in the *SMC* case is at least as substantial as that recounted by this Court in *Monsanto*. Compare Petition at 1-7, 21 with Slip Opinion at 10-13.

B. The Judgment Of The Court In The SMC Case Conflicts With This Court's Decision In *Monsanto*

In the *Monsanto* case, this Court in dictum held that conspiracy or concerted action could not properly be inferred merely from a showing that the manufacturer terminated a price-cutting distributor in response to or following complaints by other distributors. Slip Opinion at 4-5. There must be evidence that "tends to exclude the possibility that a manufacturer and nonterminated distributors were acting independently." *Id.* at 9. However, the Court affirmed the judgment of the Seventh Circuit holding that "there was sufficient evidence for a jury reasonably to have concluded that Monsanto and some of its distributors were parties to an 'agreement' or 'conspiracy' to maintain resale prices and terminate price-cutters." *Id.* at 10.

This "sufficient evidence" holding of the Court in *Monsanto*, highlights and establishes the essential error of the courts below in the *SMC* case. In the *SMC* case, the courts employed summary judgment procedures to deprive SMC of a jury trial in the face of undisputed evidence of concerted conspiratorial action which was more unrelenting and pervasive than that recounted by this Court in *Monsanto*. This is plain from even a cursory

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[2] Monsanto did not assert error as to the boycott finding. *Id.* at 13, n. 13.

comparison of the evidence recounted by the Court in *Monsanto* with the evidence recounted by the Sixth Circuit in *SMC*.

In *Monsanto*, price-cutting distributors were advised by the manufacturer that they would lose supplies if they persisted in their low prices. One distributor replied that it would comply with suggested resale prices. Slip Opinion at 10. A distributor's newsletter to his dealer-customers following his meeting with officials of the manufacturer reviewed the manufacturer's incentive and shipping policies and stated that every effort would be made to maintain prices. *Id.* at 11. Finally, the terminated distributor was told by the manufacturer that complaints from other distributors had been received about its low prices. *Id.* at 12-13.

By way of comparison, the Sixth Circuit in the *SMC* case found as evidentiary fact that the manufacturer Amana responded to the complaints from its dealers and distributors about SMC's low prices in the following manner:

(1) Amana recognized that it had a "need to eliminate any free riders [price-cutters] from its distribution chain." Its distributors and dealers told Amana that "such competition had to be eliminated" and requested the identity of SMC's supplier. At least one distributor refused to sell to SMC at Amana's request. Petition at 5. The district court's highly relevant finding substantially understating the number and timing of the refusals to deal with SMC was termed "clearly erroneous" by the Sixth Circuit. *Id.* at 12, n. 7.

(2) In order to further impede the price-cutters, Amana assisted its distributors in a price-fixing program whereby the distributors would sell to retail outlets only at prices agreed to among the distributors. *Id.* at 5-6.

(3) In response to calls for action from its distributors, Amana warned its distributors and dealers that sales to price-cutters like SMC would be monitored through Amana's computer tracking system and that sales to SMC by distributors and dealers would result in their loss of substantial economic benefits. *Id.* at 6.

(4) Amana entered written agreements with its distributors limiting the sales of Amana ovens to specified territories and customers. *Id.*

Finally, the concerted nature of Amana's dealings with its dealers and distributors to fix and maintain the resale prices of Amana products is demonstrated by the following undisputed testimony of the president of one of Amana's principal distributors (Davis-Watkins, a respondent here) concerning his meeting with his dealers:

Q. What did you tell the dealers you were going to do?

A. We told them at the time we didn't know what we could do. We listened more to them, and at the time we did not know of any action or counter action, other than we would endeavor to try to stop some way the pricing and the competition that they were experiencing from Service Merchandise. . . .

Q. You did not indicate to them that you were taking or going to take steps to see if you could stop the situation?

A. We told them we were investigating what the alternatives were toward stopping the situation.

Q. What did you do?

A. Well, basically, we tried to prevail upon Amana to help us stop the [sales to SMC]. . . . [*Id.* at 21][3]

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[3] Similarly, it is undisputed that Amana warned another distributor "that penalties would be severe for selling to people such as Service Merchandise." *Id.* at 20, n. 10.

Amana did respond to this concerted request by announcing and implementing its computer tracking system to penalize those dealing with SMC. *Id.* at 6. This community of effort among Amana and its dealers and distributors to cut off SMC's supplies in order to stabilize price is the precise kind of joint collaborative activity which this Court in *Monsanto* held offended Section 1 of the Sherman Act.

We suggest that the holding of this Court in the *Monsanto* case that the jury be allowed to determine whether the evidence establishes the alleged per se violations is of crucial importance to the enforcement of the antitrust laws. The failure of the courts below in the *SMC* case to comport with this basic concept by their summary dismissal requires the grant of certiorari.

CONCLUSION

For the reasons stated in our petition, certiorari should be granted and the judgment of the Sixth Circuit should

be summarily reversed with instructions to enter judgment for SMC on the issue of liability.

Respectfully submitted,

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March 27, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March 1984, three copies of this Second Supplemental Brief For Petitioner were mailed, postage prepaid, to counsel for each respondent:

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I further certify that all parties required to be served have been served.

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